IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1420

GRUMMAN AEROSPACE CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner Grumman Aerospace Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on November 15, 1978.

OPINIONS BELOW

The opinion of the Court of Claims is reported at 587 F.2d 498 (1978) and appears in the Appendix hereto. The opinion of the Trial Judge is set forth in the opinion of the Court of Claims. The opinion of the Armed Services Board of Contract Appeals is reported at 75-2 BCA ¶ 11,492 (1975) and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Claims was entered on November 15, 1978. By order dated January 31, 1979, the Chief Justice of the United States extended the time for filing this petition for certiorari for a period of 30 days to and including March 15, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether, in resolving a dispute as to allocation of credits to government cost reimbursement type contracts, the reviewing court is bound by those pertinent provisions of the Armed Services Procurement Regulations incorporated by reference within the contract.

2. Whether, for purposes of determining the proper accounting period for allocation of credits under a government cost type contract, the Department of Defense is foreclosed from allocating credits in a manner inconsistent with the events giving rise to the credit and with the treatment accorded such credits by other agencies of the Government.

3. Whether New York State franchise tax credits arising from a net operating loss experienced by petitioner in 1971 are properly allocable to government contracts in effect during the loss year (1971) or to the year to which the loss was carried back (1968) by operation of the State's statutory net operating loss carryback provision.

STATUTORY PROVISIONS INVOLVED

Armed Services Procurement Regulations, Section 7-203.4(b), 32 CFR § 7.203-4(b) (1966), and Sections 15-201.1, 32 CFR § 15.201-1 (1966), 15-201.2, 32 CFR

§ 15.201-2 (1966), 15-201.4, 32 CFR § 15.201-4 (1966), 15-201.5, 32 CFR § 15.201-5 (1966), 15-203(d), 32 CFR § 15.203(d) (1966), and 15-205.41(a) and (c), 32 CFR § 15,205-41(a) and (c) (1966). The pertinent text appears in the Appendix hereto.

STATEMENT OF THE CASE

In 1969, Grumman Aerospace Corporation, petitioner herein,[1] entered into a contract to develop, manufacture and deliver, over a nine-year span, F-14 fighter aircraft and associated equipment for the United States Navy. The contract used the total package procurement concept, whereby a contractor binds itself to ceiling production prices before commencing research and development. Although the Department of Defense ceased using the concept after July, 1971,[2] it continued the total package contract on the F-14. By 1971 petitioner had experienced a higher cost inflation and a lower level in its Government contracting base than either party to the F-14 contract had anticipated. In discussions during this period between petitioner's representatives and the Navy Financial Review Team and those representatives and the DOD Financial Review Team concerning the possibility of amending the F-14 contract to eliminate the ceiling production prices, the parties relied on benefits resulting from income tax carryback losses in cash flow and other financial projections. Indeed, in Congressional testimony, Admiral Zumwalt acknowledged that one of his reasons for advocating the Government's adherence to its original

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[1] Petitioner is the principal subsidiary of Grumman Corporation. Grumman Aircraft Engineering Company was the corporate predecessor of petitioner.

[2] See Department of Defense Directive 5000.1 (July 13, 1971).

F-14 contract was his awareness that the Grumman Corporation expected to recover a substantial amount of its future losses incurred against profits realized in prior years by recourse to appropriate tax refund procedures.[3] In its 1971 Annual Report, Grumman Corporation (Grumman) reported that the Company had to write down its F-14 inventories to realizable values by a charge to earnings in 1971 of $65,000,000 before tax adjustments, representing the estimated loss incurred in the performance of the work then required by its contract for the F-14A aircraft.

In and after 1968, New York imposed a "State Franchise Tax on Business Corporations." Section 208.9(f) of Article 9-A of the New York State tax law provides that:

> A net operating loss deduction shall be allowed which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code of nineteen hundred fifty four . . . .

In 1972, Grumman received from New York a credit or payment of $1,609,000 including interest, as a result of its application of the net operating loss carryback from its 1971 fiscal year to its 1968 net income which had formed the basis for the computation of the franchise tax in that year. Receipt of the New York State franchise tax credit was accrued to 1971 and recorded on the Company's December 31, 1971 balance sheet.

At all times pertinent here, all of petitioner's government cost reimbursement type contracts contained

[3] See Hearings on S.3108 before the Senate Committee on Armed Services, 92d Cong., 2d Sess., pt. 6, at 3801-02 (1972). Appellant's Exhibit Number 5 before the Armed Services Board of Contract Appeals.

the standard "Allowable Cost, Incentive Fee, and Payment" clause as prescribed by Armed Services Procurement Regulations (ASPR) 7-203.4(b), 32 CFR § 7.203-4(b) (1966), which recites in pertinent part:

> (a)(1) For the performance of this contract, the Government shall pay to the Contractor—
>
> (i) the cost thereof (hereinafter referred to as "allowable cost") determined by the Contracting Officer to be allowable in accordance with—
>
> (A) Part 2 of Section XV of the Armed Services Procurement Regulation as in effect on the date of this contract; and
>
> (B) the terms of this contract;
>
> * * * *
>
> (f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract.

The regulations prescribed by the standard "Allowable Cost" clause, Part 2 of Section XV of the Armed Services Procurement Regulations, include the following:

> 15-203 *Indirect costs.*
>
> * * * *
>
> (d) The method of allocation of indirect costs must be based on the particular circumstances involved. The method shall be in accord with those generally accepted accounting principles which are applicable in the circumstances. The contractor's established practices, if in accord with such ac-

counting principles, shall generally be acceptable. . . .

15-201.2 *Factors affecting allowability of costs.*

Factors to be considered in determining the allowability of individual items of cost include (a) reasonableness, (b) allocability, (c) application of those generally accepted accounting principles and practices appropriate to the particular circumstances, and (d) any limitations or exclusions set forth in this subpart, or otherwise included in the contract as to types or amounts of cost items.

* * * *

15-201.4 *Definition of allocability.*

A cost is allocable if it is assignable or chargeable to a particular cost objective . . . in accordance with the relative benefits received or other equitable relationship. . . .

By memorandum dated August 4, 1972, Grumman advised the Defense Contract Audit Agency (DCAA) that it proposed to allocate the New York State income tax credit to its various subsidiaries, including petitioner, on the basis of the proportion of net income or loss of each of them to the entire loss and to determine and apply the credit "to individual contracts . . . using the 1971 G & A [general and administrative] base." Grumman advised that this treatment of the tax credit was consistent with generally accepted accounting principles which prescribe that the tax effects of operating loss carrybacks be allocated to the loss period, with pertinent Federal tax rulings, and with the fact that contracts existing and being performed in 1971 gave rise to the operating loss.

It is undisputed that Grumman's accounting for its 1971 losses and its treatment of the 1971 tax credit met with the Government's approval, with one exception.

Noting that petitioner had a greater proportion of Government cost-type contracts in 1968 than in 1971 and that the change in contract mix between 1968 and 1971 would substantially affect the Government's participation in a credit to the subsidiary, the United States, respondent herein, by the DCAA resident auditor, declared that in these circumstances the state income tax credit claimed by Grumman should be allocated to 1968 contracts. Grumman was so advised by letter dated December 7, 1972.

On December 26, 1972, Grumman responded by asserting the propriety of its treatment of the credit and declining to adjust its journal entries as requested. Grumman noted: "Simply stated, it was the 1971 loss which resulted in the refund and it seems obvious and equitable to us that the work performed in the year the loss was generated should benefit from the resulting tax credit."

On April 5, 1973, the resident auditor disapproved costs of $90,737 on a selected Navy contract, specifically contract N00019-67-C-0078. Sixty days after issuance, the Notice of Disapproved Costs (DCAA Form No. 1) became the final decision of the contracting officer. Petitioner thereupon took a timely appeal to the Armed Services Board of Contract Appeals (ASBCA or Board).

As noted in the Administrative Judge's opinion, this dispute is "a test case controlling substantially larger sums." The single contract on which the disallowance at issue here is nominally based, the "EA-6B Contract," is a cost type contract for the conversion of existing A-6A aircraft in fleet inventory to an electronics countermeasures version (the EA-6B) and construction of

pre-production EA-6B aircraft. The last aircraft to be supplied under the terms of the EA-6B contract was delivered in March, 1970, and it is undisputed that performance of this contract in no way contributed to the 1971 losses giving rise to the instant controversy.

After an evidentiary hearing, the Board denied petitioner's appeal. In his opinion for the Board, the Administrative Judge dismissed as irrelevant to the issue presented any "allegedly underlying economic policies and theories." Treating the payment at issue as a "tax refund," the Board concluded that allocation of "the 1968 franchise tax refund" must be governed by the provisions of paragraph (f) of the "Allowable Cost, Incentive Fee, and Payment" clause. The Board noted that the collective impact of the ASPR cost principles favored the Government's rights in the refund of taxes which had been allowed as contract costs. "Allocation on any other basis," the Board noted, "would be inconsistent with the mandate of the contract clause, especially when it would result in crediting government cost reimbursement type contracts with 14.22% of the refund, as appellant suggests, instead of with 39.77% when applying the 1968 allocation formula." The Board concluded, in effect, that because the contractor had been proportionately reimbursed by the Government for the 1968 franchise tax, application of the specific regulations governing cost determinations was unnecessary.

Petitioner sought review in the Court of Claims under the standards of the Wunderlich Act, 41 U.S.C. §§ 321-22 (1976). The case was briefed and argued before the Trial Judge on the parties' cross-motions for summary judgment. The Trial Judge recommended decision in favor of respondent. The Court of Claims,

on petitioner's request for review, affirmed and adopted the Trial Judge's opinion and decision as the basis for its judgment and dismissed the petition.

In its decision, the Court of Claims characterized the issue presented in this case as a novel one. It nonetheless proceeded to treat the issue consistent with the view adopted administratively. The court interpreted the credit literally as "a 'refund' of, and a reduction in the amount of, Grumman's New York State franchise tax liability for 1968." On that basis, the court found that the terms of Article 4(f) controlled, without regard to specific provisions of ASPR Section XV, which dictate a contrary result.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS CONCERNING THE STANDARDS APPLICABLE TO THE ADJUDICATION OF DISPUTES ARISING FROM THE ADMINISTRATION OF GOVERNMENT COST TYPE CONTRACTS.

A. The Court of Claims Should Not Be Permitted To Resist Its Obligation To Apply The Principles Contained In The Armed Services Procurement Regulations.

In this case, the Court of Claims was required to determine the proper time period for allocation of a state income tax loss carryback credit under a government cost reimbursement type contract. The novelty of the question derives from the fact that the dispute involved the year to which allocation of the credit should be made in circumstances where allowance of the cost is not in issue. This distinction apart, the case belongs to that category of actions brought under the disputes clause by a contractor seeking reimbursement for direct or indirect costs as a part of general and administrative expenses incurred in performance of the cost type contract. Accordingly, the case presents a cost

accounting problem for resolution of which the Court of Claims looks to those standards embodied in Section XV of the ASPR. See, *e.g., Dynalectron Corporation* v. *United States,* 545 F.2d 736 (1976); *Sundstrand Turbo* v. *United States,* 389 F.2d 406 (1968); *Lockheed Aircraft Corporation* v. *United States,* 375 F.2d 786 (1967); *United States Steel Corporation* v. *United States,* 367 F.2d 399 (1966). In the instant case, the Court of Claims has substantially departed from the framework of analysis applied in like cases and, in so doing, seriously undermines the proper role of the ASPR in governing contract interpretation and disputes resolution.

The principles and procedures for cost determinations are set forth in Section XV of the ASPR, and are required to be incorporated by reference in cost reimbursement contracts. ASPR § 15-102, 32 CFR § 15.102 (1966). Section XV resulted from wide recognition following World War II of the necessity for development of uniform cost standards for cost reimbursement contracts. *Lockheed Aircraft Corporation, supra* at 793. Section XV, implementing the Armed Services Procurement Act of 1947, 62 Stat. 21, as amended, 10 U.S.C.A. §§ 2301-2314 (1978), has the full force and effect of federal law. See, *Paul* v. *United States,* 371 U.S. 245, 255 (1963); *Public Utilities Comm. of California* v. *United States,* 355 U.S. 534, 542-543 (1958); *G.L. Christian and Associates* v. *United States,* 320 F.2d 345 (1963). Application of Section XV to cost type contract disputes is appropriate both because it is perceived as embodying a standard of conduct that is fair and equitable and because "section XV is a composite of sound accounting rules (in the usual government view)." *Lockheed Aircraft Corporation, supra* at 793.

In its holding in this case, the Court of Claims rejected the contractor's contention that pertinent provisions of part 2 of section XV should be applied, notwithstanding the same court's conclusion in *Lockheed* that "the only reason to bar its application might be the contractor's objection." *Id.* While its opinion reflects the court's view that its result is consistent with ASPR principles, its refusal to apply ASPR provisions in reaching its result cannot be justified.

The Court of Claims' refusal in this case to apply pertinent provisions of the ASPR serves to insulate decision of this controversy from its substance. The objectives of government contract cost determination and the criterion for allocating indirect costs are set forth in, *inter alia,* ASPR Section 15-201.1 "Composition of Total Cost," Section 15-201.2, "Factors Affecting Allowability of Costs," Section 15-201.4, "Definition of Allocability," and Section 15-203, "Indirect Costs." The court below, while acknowledging the incorporation of these provisions and others in the challenged contract, failed to address and to follow the principles contained in these provisions. The court thus rendered meaningless the regulatory and contractual principles which specifically govern allocation, and which require allocation in accordance with generally accepted accounting principles and relative benefits received or other equitable relationship.

The petitioner's excess F-14 costs which gave rise to its 1971 net operating loss and ultimately a tax refund stand in equitable relationship and benefit the cost objectives of the F-14 and other 1971 contracts for which the excess costs were specifically incurred. No cost objectives of the EA-6B contract in effect in 1968

benefitted from F-14 costs nor do those costs stand in any "equitable relationship" to cost objectives of the EA-6B contract, but such analysis, contemplated by the ASPR provisions, was avoided in this case. Finally, while bypassing the approach urged by petitioner to be compatible with cost accounting principles advanced in the ASPR—for instance, matching costs and contracts giving rise to a net operating loss with the credits resulting from that loss—the court below chose instead, as its determinant for the proper year to which to allocate the credit, a wooden application of the carryback mechanism of the tax laws. Repeated use of the court's approach will inevitably yield unpredictable, unrealistic results in a context in which adherence to economic reality and reliance on predictability should be hallmarks of the relationship between the Government and the contractor.

The parties entered into the contract expecting to rely on the accounting principles prescribed by the contract. Cost accounting principles and procedures are adopted after careful consideration by the accounting profession. They are used as a management aid by persons who operate contracting companies. Parties to government contracts should be protected from unreasoned change of accounting principles. Respondent drafts and promulgates the ASPR and knew that the standard contract provisions prescribed by these regulations were non-negotiable. To change the accounting rules or ignore the rules when the very contract provisions prescribed by the regulations incorporate them and compel their consideration is clearly erroneous.

B. In Reaching Its Result, The Court Below Failed To Give Adequate Weight To Petitioner's Reliance On Intra-Government Consistency.

Petitioner's argument in support of its allocation of the state tax credit to 1971 is based, in part, on the following points.

(1) United States Treasury Department Revenue Rulings require that the time period in which the net operating loss is recognized receive the tax credit arising under Federal income and New York State franchise tax laws. Rev. Rul. 65-190, 1965-2 Cum. Bull. 150.

(2) The Securities and Exchange Commission has adopted Accounting Principles Opinion No. 11, requiring that in preparing financial statements loss carrybacks be recognized in the loss year.

(3) ASPR specifies that allocation be in accordance with GAAP. GAAP require that income tax credits arising from net operating losses be recognized in the loss year. *E.g.,* ASPR Section 15-203(d).

(4) Grumman and the Naval Air Systems Command negotiators assumed during 1971 and 1972 F-14 contract restructuring negotiations that petitioner would participate fully in Federal income tax and New York State income tax credits arising from losses in performance of the F-14 contract.

(5) From 1969 when it assumed its present corporate structure, Grumman regularly allocated state income taxes and related credits to companies and to periods under a profit and loss accounting system. That accounting allocated state income taxes and related credits among entities and time periods to contracts based on a cost input allocation system. Thus when an operating entity in the system, *e.g.,* a subsidiary company such as Grumman International, had a loss, as indeed Grumman

International had in 1970, the entity with the loss received a credit in recognition of the fact that for each dollar of net loss sustained by Grumman International there was a decrease in the tax expense for the system. By contrast, entities showing a profit received not a credit but a tax charge. The Defense Contract Audit Agency never questioned this system from petitioner's reorganization in 1969 to 1972 when some of the credits allocated to petitioner were from the parent corporation's tax credit because the parent had suffered an overall net operating loss for 1971. Although DCAA had never attempted to force petitioner or any other Grumman subsidiary having cost type government contracts to allocate tax credits to other than the loss year, it nevertheless chose here to disallow petitioner's allocation.

The most conspicuous feature of accounting for the effect of an income tax net operating loss carryback is that there exists a uniformity of treatment by Federal agencies and the accounting profession. In dismissing much of petitioner's reasoning as irrelevant, the Court of Claims failed to address the fundamental requirement that a procuring agency behave consistently in its contract negotiations and in its audit functions and that, to the extent practicable, a single contractor be permitted to satisfy all regulatory accounting requirements of the Government in a consistent manner. Moreover, it is no answer simply to brush off generally accepted accounting principles as primarily designed for financial accounting and not pertaining to government contract cost questions. Respondent incorporates rules basically designed for financial accounting as the guide for its contract cost accounting, as it did here, whenever it deems it to be in its best interest. See, *e.g.*, Defense Acquisition Circular No. 76-19, Item XXXVI, September 1, 1978.

In addition to pointing to support for its treatment of the tax credit in GAAP—the contractual and regulatory standard—petitioner also relied on the system of income tax allocation accepted by the IRS, followed by the SEC and widely used in public utility accounting. Significantly, since 1969 respondent had accepted Grumman's allocation of tax charges and credits to business segments based on the identical tax allocation accounting system rejected by respondent in this case. Indeed, in this very case respondent took no exception to the allocation of the net operating loss carryback refund to segment, only to time period. As a result of its adherence to widely accepted accounting procedures and its reasonable expectation that respondent would behave in consistent fashion, petitioner and its shareholders believed in 1971 that they were entitled to a valuable economic right, *viz.*, receiving the benefit of a tax credit or refund in the year in which the Company suffered the loss generating the credit. By its decision below, the Court of Claims sanctioned respondent's appropriation of that right without any apparent justification in principle or in policy.

C. The Analysis Employed By The Court Below Cannot Withstand Scrutiny.

In relying on a non-contractual, non-ASPR based source for an allocation "principle," the mechanics of the tax laws, the Court of Claims failed to recognize the nature and purpose of those mechanics. The purpose of federal and state income tax carryback provisions is to benefit operations of the loss year. They were "enacted to ameliorate the unduly drastic consequences of taxing income strictly on an annual basis.

They were designed to permit a taxpayer to setoff its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year." *Libson Shops, Inc.* v. *Koehler,* 353 U.S. 382, 386 (1957).

In the instant case, the court's deference to the form of the tax carryback mechanism, without regard to its substantive purpose, leads to a result at odds with that policy. As noted in *Allegheny Airlines, Inc.* v. *C.A.B.,* 465 F.2d 778 (1972):

> An actual tax policy may tolerate fictional reallocations of income items from one year to another in a continuing system of consistent principles, but, when the rules are changed, fictional attribution of unaccrued items to previous years is not required by any such policy.
>
> Literally, but superficially, a tax refund resulting from carrying losses back to earlier profit years is a refund of taxes paid on profits earned in the earlier years, but, in a context of treatment of such refunds as income additions, it is much more relevant to remember that the refunds resulted from losses in the later years and cannot conceivably be said to have been earned in the earlier profit years. 465 F.2d 778, 783.

In this case, the sole nexus between the operating loss deduction and the "refund" and the prior year 1968 is the operation of the tax mechanism which fortuitously carried the loss deduction to that year. If 1968 taxable income had been so low as not to exhaust the 1971 net operating loss tax carryback credit, the credit would have been carried to another year. Respondent's rights to reimbursement for its payment as costs of a portion of petitioner's state franchise taxes are fully satisfied, consistent with actual tax policy, by an allo-

cation of the carryback credit to contracts performed in the loss year. Thus, allocation of the tax credit to 1971 conforms with the substantive intent, rather than mechanical form, of the revenue laws.

D. The Policy Considerations Raised By This Case Warrant The Grant Of Certiorari To Review The Judgment Below.

The result arrived at by the court below is in error. However, the primary significance of the Court of Claims' decision does not rest with the result. The result, clearly favoring respondent's monetary interests, appears to be the product of a singular decision making process whereby the Court of Claims sought to construe contract language unsupported by recourse to any set of principles save the mechanics of the tax laws. The decision below rests on the court's disavowal of: the relevance of the financial realities of the facts of the case; the governance of such contracts by the ASPR; the vital significance which contracting officers and contractors alike place on established custom and practice; and the necessity for predictability and consistency in economic regulation within the overlapping domains of Government agencies and departments. These disavowals will have an important, and continuing impact on the administration and performance of government contracts particularly because the Court of Claims is most often the final arbiter of government contract law. The reasoning adopted by the ASBCA and the Court of Claims in this case is capable of application in resolving innumerable contractual disputes and manifestly overshadows the specific set of facts giving rise to the instant dispute. But the reasoning is unsupported and it results in a rule for government contract cost accounting which is, without any necessity, disharmonious with other established ac-

counting principles. When government is so involved in various aspects of business regulation, there is no reason to create new and different accounting treatment for government contracts in the face of a regulatory system (ASPR) which provides for harmony and contemplates accounting treatment consistent with the experience already gained by accounting authorities and other government agencies.

The enormous role in our national economic life played by the United States Government as procurer of goods and services, with its attendant complexities and bureaucratic regulation, forecloses the facile view embraced below that this dispute arising under a standard form of Government contract presents, in the words chosen by respondent, "no more than an elementary contract case." This Court has, in the past, had occasion to acknowledge that the resolution of government contract disputes and the principled administration of government contracts may constitute important questions warranting plenary review. See, *e.g., United States* v. *Utah Construction and Mining Co.,* 384 U.S. 394 (1966); *United States* v. *Moorman,* 338 U.S. 457 (1950); *United States* v. *Howard P. Foley Co.,* 329 U.S. 64 (1946); *United States* v. *Holpuch,* 328 U.S. 234 (1946); *United States* v. *Beuttas,* 324 U.S. 768 (1945); *United States* v. *Blair,* 321 U.S. 730 (1944). Petitioner submits that the time is again propitious for this Court to consider questions affecting judicial review and the standards for review of government contract disputes.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Claims.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINION AND DECISION OF ARMED SERVICES BOARD OF CONTRACT APPEALS

ARMED SERVICES BOARD OF COTRACT APPEALS

ASBCA No. 18590

Appeal of—Grumman Aerospace Corporation
Under Contract No. N00019-67-C-0078

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OPINION BY ADMINISTRATIVE JUDGE RIISMANDEL

In this appeal the Board is asked to determine the year to which a substantial refund of New York State Corporation Franchise Tax should be allocated. The dispute arises as a result of a Notice of Disapproved Costs (DCAA Form No. 1) which, by its terms, became a final decision of a contracting officer of the Naval Air Systems Command (NAVAIR). The total amount of New York State tax refunded to the Grumman Corporation was $1,609,000, of

which $1,538,585 was allocated by the parent corporation to appellant, Grumman Aerospace Corporation (GAC). The disapproved amount under the contract cited in the caption was $90,737. This dispute is, however, a test case controlling substantially larger sums.

There is no dispute about the basic contractual facts in this case to which the parties have stipulated. In joining in the stipulation the Government reserved its position that the events which gave rise to GAC's receipt of the $1,538,585 allocation of the New York tax refund are not relevant or material to determination of the year to which the money should be allocated.

Preliminary Matters

Respondent objects to the consideration by the Board of an excerpt from Grumman's special report of 20 January 1972 to its stockholders, reproduced at page 16 of appellant's brief, and of Appendix 1 to the brief which is an 8-page "Detailed Description of F-14 Contract", on the grounds that neither of these documents was introduced into evidence. This objection is well taken. Since there has been no showing why these documents should be included in the record pursuant to Board's Rule 13(b), the Board does not regard them as part of the record.[1] *Canon Construction Corporation,* ASBCA No. 15208, 71-1 BCA par. 8780; *McDonnell Douglas Corporation,* NASA BCA No. 873-10, 75-1 BCA par. 11,337. Similar objection has been raised to appellant's discussion of the Interim Report of the New York State Tax Structure Committee in the brief.

[1] We note, however, that a review of these documents provides no grounds for concluding that our decision would be any different were they a part of the record.

This document was at length quoted from and discussed in appellant's pre-trial brief and also referred to at the hearing (Tr. 2-102, 103). Thus respondent clearly was on notice of the use appellant intended to make of this document and had an opportunity to review it. The objection is overruled. Cf. *Melrose Waterproofing Co.,* ASBCA No. 9058, 1964 BCA par. 4119.

Findings of Fact

A. *The Contract and Background*

1. The contract under which this appeal was brought first took form as a letter contract offered to NAVAIR by Grumman Aircraft Engineering Corporation (GAEC) on 26 July 1966 and accepted on 5 August 1966. This letter contract was superseded on 19 January 1968 by a definitized cost plus incentive fee contract. As a result of a reorganization of Grumman Corporation, a novation agreement between the Government, GAEC, and GAC was executed 30 June 1969 transferring this contract from GAEC to GAC (Stipulation par. 2-4).

2. This contract (the EA-6B contract) called for modification of three Government-furnished A6A aircraft to add all-weather electronic countermeasures. Also required was manufacture of five preproduction EA-6B aircraft. The contractor was to flight test these aircraft and provide, *inter alia,* training, special support, and engineering and technical services. The last aircraft to be supplied under the terms of the EA-6B contract was delivered in March 1970 (Stipulation par. 5).

3. Grumman Corporation reported a net loss of $17,989,-580 in its Annual Report for 1971 as follows (Stipulation par. 6; App. Exh. A-1):

"CONSOLIDATED STATEMENT OF INCOME (LOSS)

	Year ended December 31, 1971	1970
Sales	$799,021,180	$993,260,754
Other income	1,717,968	2,149,300
	800,739,148	995,410,054
Costs and expenses:		
Wages, materials, and other costs and expenses	830,123,885	949,361,340
Interest	6,804,843	8,277,010
Provision (credit) for Federal taxes on income (Note 6)	(18,200,000)	17,500,000
	818,728,728	975,138,350
Net Income (Loss)	$(17,989,580)	$ 20,271,704"

4. Also in its 1971 Annual Report Grumman reported a substantial estimated pre-tax loss on its contract for the F-14 aircraft entered into in 1969. This loss was reflected on Grumman's books by a write-down of inventories to realizable values. In this connection, after stating that inventories are carried on Grumman's books at the lower of cost or realizable value, Note 2 to the 1971 Annual Report's Financial Statements (p. 8) explained:

"Under the Company's accounting practices, sales and profits (based on estimated average final costs) under Government fixed-price type contracts are recorded at the time of delivery in the case of production contracts, and as costs are incurred in the case of research, development, test, and evaluation contracts. Sales under Government cost-reimbursement type contracts are recorded as costs are incurred and include applicable earned fees essentially in the proportion that costs incurred bear to total estimated final costs. Certain contracts provide for an increase or decrease of profits dependent upon whether cost and/or product performance targets are surpassed or not attained, respectively. The effects of these incentives are reflected in income when there is sufficient information to relate actual performance to the targets with the result that earnings recorded in one period may include adjustments related to sales recorded in a prior period. Losses on contracts are recorded when they become identifiable.

"In accordance with this policy the Company has had to write down its F-14A inventories to realizable values by a charge to earnings in 1971 of $65,000,000, before tax adjustments, representing the estimated loss which will be incurred in the performance of the work now required by its contract for the F-14A Tomcat aircraft. The contract includes the flight development program and a total of 86 aircraft. Changes in the contract delivery schedules for the F-14A have become necessary because of the realignment in the flight test schedules caused by the loss of the first test aircraft in December, 1970. The anticipated net effect of the price adjustments necessitated by this realignment and other contract changes has been taken into consideration in estimating this loss.

"The contract contains further options for the Government to procure varying quantities of aircraft at specified ceiling prices. If the Government exercises any or all of these options at those ceiling prices the Company would incur substantial additional losses. Although the Company is proceeding with the performance of the work described in the preceding para-

graph it has advised the Department of the Navy that it considers the Government's options to be invalid and that it cannot accept orders for additional F-14A aircraft at the ceiling prices now specified in the contract. The Company has entered into discussions with the Department of the Navy to resolve these various problems but it is not possible to predict the outcome of this matter."

5. The contract which gave rise to the loss in question here was a total package procurement calling for the design, development, test, and evaluation of an aircraft which became known as the F-14 Tomcat. The contract also called for the production of a specified number of aircraft and contained options for the Government to purchase additional quantities. This contract was of the fixed price incentive fee variety so that up to a point costs were paid by the Government. Between that point and a ceiling the costs were shared between the Government and the contractor, but over the ceiling all costs were borne by Grumman.

6. The New York State tax involved is the "State Franchise Tax on Business Corporations", which requires taxpayers to make four alternate calculations in order that the method of taxation be ascertained. Under the first of these methods the statutory tax rate is applied to the corporate taxpayer's "Taxable New York Income" which is arrived at by an allocation method from its entire net income less certain deductions on the basis of gains and depreciations on qualified New York property. Two of the three other methods of computation are based variously on business and investment capital, or on net income and payments to certain shareholders. The fourth method is a flat fee of $125. The taxpayer pays whichever figure is greatest but not less than a statutory minimum. Regardless of the computations method used, there is added a tax computed at the statutory rate of the portion of the corporation's

subsidiary capital allocated within the state (Appendix ? to App. Main Brief; App. M. Br. p. 19; Govt. Exh. 1).

7. With respect to the net operating loss the New York State tax law provides in Sec. 208.9(f) of Article 9-A:

> "A net operating loss deduction shall be allowed which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code of nineteen hundred fifty four. . . ."

There was allowed a carry-back of the net operating losses for three years and a carry-forward for five years. Pursuant to these provisions Grumman Corporation carried back the loss to 1968 where there was sufficient income to absorb the loss. In early 1972 Grumman filed with the New York State tax authorities Form CT-8 which is entitled "Claim for Credit or Refund of Corporation Tax Paid—Articles 9, 9A, 9B, 9C, 13, and 27—Tax Law", requesting thereon a refund of $1,590,888. This amount was arrived at by deducting from the 1968 tax of $1,807,870 the minimum tax payable, for 1968, 216,982 which was computed on the basis of "allocated capital" (R4, Doc. 6).

8. The refund of $1,609,000, including interest, was received in 1972 (Stip. par. 7).

9. In a memorandum of 4 August 1972 (R4, Doc. 2) appellant advised the DCAA resident auditor that it proposed to allocate the franchise tax refund to its various subsidiaries on the basis of the proportion of the net income or loss of each of them to the entire loss, in accordance with Grumman's past practice, and to apply it to 1971 contracts. The reasons given for this treatment were that the generally-accepted accounting principles prescribed that the tax effects of operating loss carry-backs be allocated to the loss period, which was also the treatment directed by Federal tax rulings, for renegotiation purposes the credit must be applied to the 1971 income, and that

contracts existing and being performed in 1971 gave rise to the net operating loss.

10. Based on advice received from the DCAA headquarters (Tr. 3-50-52), the resident auditor in letter of 7 December 1972 (R4, Doc. 3) requested that the refund be allocated to contracts on the basis of 1968 mix because the proper allocation of the refund should follow the burden of the tax as originally allocated.

11. Appellant advised by letter of 26 December 1972 (R4, Doc. 4) that its treatment of the refund was proper and thus it would not adjust its journal entries as requested. The letter stated: "Simply stated, it was the 1971 loss which resulted in the refund and it seems obvious and equitable to us that the work performed in the year the loss was generated should benefit from the resulting tax credit."

12. On 5 April 1973, the resident auditor disapproved costs of $90,737 on this contract (and others) on DCAA Form No. 1 which, after passage of 60 days, became the contracting officer's final decision. The auditor regarded 1968 as the appropriate year for the distribution on the grounds that the 1968 franchise tax was being recovered and thus the 1968 contract cost allocations were in effect adjusted, and that the change in contract mix between 1968 and 1971 would substantially affect the Government's participation in the recovery since the proportion of the Government's cost type contracts was in 1971 less than one-half of that in 1968. The auditor concluded that the contractor's position was without merit and that the ASPR provisions on credits (15-201.5) and allocability (15-201.4) governed the accounting treatment of the monies received (R4, Doc. 5). The contractor appealed timely from this decision.

13. It is agreed by the parties that during 1968 a substantially greater proportion of Grumman's business with

the Federal Government was in cost type contracts than was the case in 1971. These actual percentages are as follows (R4, Doc. 5):

Type of Contract	Percentage Participation in Allocation Base	
	1971	1968
Cost type	14.22% ($226,110)	39.77% ($632,380)
FPI	63.06% ($1,002,710)	20.14% ($320,245)
FFP & Other	22.72%	40.09%

14. The G&A expense pool was allocated to individual contracts on the basis of their total cost input. This consisted of the sum of direct labor cost, direct material cost, and manufacturing and engineering overhead costs (Tr. 1-8-9).

15. The contract contained the October 1966 version of the standard "Allowable Cost, Incentive Fee, and Payment" clause (ASPR 7-203.4(b)), pertinent parts of which read (R4, Doc. 7):

> "(a)(1) For the performance of this contract, the Government shall pay to the Contractor—
>
> (i) the cost thereof (hereinafter referred to as 'allowable cost') determined by the Contracting Officer to be allowable in accordance with—
>
> (A) Part 2 of Section XV of the Armed Services Procurement Regulation as in effect on the date of this contract; and
>
> (B) the terms of this contract; . . .
>
> * * *
>
> "(f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any inter-

est thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract. . . ."

16. The parties have considered pertinent also the following provisions of ASPR Section XV (R4, Doc. 1);

"15-201.4 *Definition of Allocability.* A cost is allocable if it is assignable or chargeable to a particular cost objective, such as contract, product, product line, process, or class of customer or activity, in accordance with the relative benefits received or other equitable relationship. Subject to the foregoing a cost is allocable to a Government contract if it—

(i) is incurred specifically for the contract;

(ii) benefits both the contract and other work, or both Government work and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(iii) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

"15-201.5 *Credits.* The applicable portion of any income, rebate, allowance, and other credit relating to any allowable cost, received by or accruing to the contractor, shall be credited to the Government either as a cost reduction or by cash refund, as appropriate.

* * *

"15-204 *Application of Principles and Procedures.*

(a) Costs shall be allowed to the extent that they are reasonable (see 15-201.3), allocable (see 15-201.4),

and determined to be allowable in view of the other factors set forth in 15-201.2 and 15-205. These criteria apply to all of the selected items of cost which follow, notwithstanding that particular guidance is provided in connection with certain specific items for emphasis or clarity.

* * *

(c) Selected items of cost are treated in 12-205. However, 15-205 does not cover every element of cost and every situation that might arise in a particular case. Failure to treat any item of cost in 15-205 is not intended to imply that it is either allowable or unallowable. With respect to all items, whether or not specifically covered, determination of allowability shall be based on the principles and standards set forth in this Part and, where appropriate, the treatment of similar or related selected items.

"15-205 *Selected Costs.*

* * *

"15-205.41 *Taxes.*

(a) Taxes are charges levied by Federal, State, or local governments. They do not include fines and penalties except as otherwise provided herein. In general, taxes (including State and local income taxes) which the contractor is required to pay and which are paid or accrued in accordance with generally accepted accounting principles are allowable, except for—

* * *

(c) Any refund of taxes, interest, or penalties, and any payment to the contractor of interest thereon, attributable to taxes, interest, or penalties which were allowed as contract costs, ***shall be credited or paid to the Government in the manner directed by the Government, provided*** any interest actually paid or credited to a contractor incident to a refund of tax, interest or

penalty shall be paid or credited to the Government only to the extent that such interest accrued over the period during which the contractor had been reimbursed by the Government for the taxes, interest or penalties." (Emphasis supplied)

B. *Expert Testimony*

17. Grumman brought to the stand as an expert witness Alan E. Peterson, a partner and director of Government contract work for Arthur Andersen and Company, a leading international firm of certified public accountants headquartered in Chicago, who has extensively written and lectured on accounting matters as they pertain to Government contracts (Tr. 2-8-19, App. Exhs. A-6, A-7).

18. The basic import of Mr. Peterson's testimony was that appellant, consistently with its own practice and in accordance with generally-accepted accounting principles, credited the franchise tax carry-back to 1971 and allocated the refund properly to contracts on the basis of their cost input in that year (Tr. 2-119-122).

19. Mr. Peterson defined generally-accepted accounting principles (GAAP) as "those accounting principles and practices which have over the years and through usage derived a high degree of authoritativeness and respectability" (Tr. 2-22). He pointed out that the pronouncements of the Accounting Principles Board (APB) of the American Institute of Certified Public Accountants are important requirements within the profession which accountants generally follow and that "accountants depart from those pronouncements at very substantial personal risk" (Tr. 2-24, 25). He referred to a Special Bulletin dated October 1964 (App. Exh. A-8) in which the American Institute of Certified Public Accountants advised its members that any departure from APB opinions must be so disclosed either in footnotes to financial statements or in audit reports of members issued in their capacity as independent auditors.

20. Mr. Peterson emphasized the importance of APB Opinion No. 11, "Accounting for Income Taxes", dated December 1967, in the proper tax allocation. He attached special significance to paragraph 44 of the opinion which reads as follows (App. Exh. A-2):

> "44. The tax effects of any realizable loss carry*backs* should be recognized in the determination of net income (loss) of the loss periods. The tax loss gives rise to a refund (or claim for refund) of past taxes, which is both measurable and currently realizable; therefore the tax effect of the loss is properly recognizable in the determination of net income (loss) for the loss period. Appropriate adjustments of existing net deferred tax credits may also be necessary in the loss period." (Emphasis in original)

21. The principle embodied in the above-quoted paragraph 44 had been earlier included in Accounting Research Bulletin No. 43 dated June 1953, Chapter 10, par. 16 (App. Exh. A19), which was superseded by APB No. 11 (Tr. 2-29). While recognizing that APB No. 11 by its language established a sound accounting practice for financial statement reporting, he stated that this practice was also used in contract pricing and cost determinations (Tr. 2-136, 3-91).

22. In Mr. Peterson's opinion the generally-accepted accounting principles, because of references thereto in the ASPR, are to be used for guidance if the ASPR Section XV was silent or unclear with respect to special accounting treatment of costs or credits (Tr. 2-46-49). These principles were also followed in regulatory accounting such as reports to the Securities and Exchange Commission (SEC) (Tr. 2-76-77) and in public utilities accounting (Tr. 2-78-80), as well as for Federal income tax purposes as shown in Revenue Ruling 65-190 (Tr. 2-113-114). This ruling states that for Federal income tax purposes

> "... a refund of New York State corporation franchise taxes resulting from a net operating loss carryback is

properly accruable in the income of a taxpayer using the accrual method of accounting for the taxable year of the loss which gives rise to the refund." (App. Exh. A-15)

23. Mr. Peterson made a distinction between accounting "principles" or matters of fundamental importance and "mechanics", which he defined as matters of detailed bookkeeping practices (Tr. 2-61). He stated that unless the "accounting mechanics" follow the principles a poor cost determination results (Tr. 2-62).

24. In the opinion of Mr. Peterson the New York State franchise tax was a true income tax within the meaning of paragraph 13(a) of APB No. 11 which defines income taxes as "Taxes based on income determined under provisions of the United States Internal Revenue Code and foreign state and other taxes (including franchise taxes) based on income." (Tr. 3-93) However, he qualified this opinion as follows (Tr. 3-95-96):

"Mr. Smith, I may have misspoken just a moment ago by not being as clear in one of my answers, I think a couple of questions ago, and I think this was before Mr. Bretschneider objected.

"You did ask me whether this statutory minimum calculation caused me to believe something to the effect that in New York, a New York State income tax was not an income tax, if you will, and I believe my answer was, Yes.

"I intended that answer to apply to Grumman's situation in 1968, through 1971.

"It might be possible that some years ago, some year, or under some circumstances we could find a situation where the New York State income tax didn't really work like an income tax either in the main or at some particular time for some strange reason.

"So that my answer should have been, and I apologize for this: It should have been Yes, in 1968 through 1971, in Grumman's situation.

25. One of the features emphasized by Mr. Peterson was the importance of "matching" in accounting for income taxes, described in paragraph 14d of APB 11 (App. Exh. 2) as follows:

"Matching is one of the basic processes of income determination; essentially it is a process of determining relationships between costs (including reductions of costs) and (1) specific revenues or (2) specific accounting periods. Expenses of the current period consist of those costs which are identified with the revenues of the current period and those costs which are identified with the current period on some basis other than revenue. Costs identifiable with future revenues or otherwise identifiable with future periods should be deferred to those future periods. When a cost cannot be related to future revenues or to future periods on some basis other than revenues, or it cannot reasonably be expected to be recovered from future revenues, it becomes, by necessity, an expense of the current period (or of a prior priod)."

26. Mr. Peterson referred to matching as a "pervasive accounting concept" and defined it this way (Tr. 2-50-51):

"The accounting concept of matching requires that costs incurred for the benefit of an accounting period or costs that are incurred for a cost objective, be matched effectively with that objective and with the accounting period that is involved."

And he added that the same would be true with regard to credits. As an example of credit matching he cited a dis-

count granted to achieve a sale. In accounting the revenue arising from the sale and the recognition of the discount should be matched and recorded in the same accounting period (Tr. 2-51).

27. Mr. Peterson also expressed the opinion that the real relationship between generally-accepted accounting principles and practices and Government cost determinations as under ASPR is that often both will have the same objective. As an example he cited determining the economic realities having to do with costs and determining the proper costs of an accounting period (Tr. 2-50, 52-53).

28. Another point emphasized by Mr. Peterson was the difference between a tax carry-back and a tax refund. By his definition a refund is essentially a corrective measure to restore to the taxpayer the amount of an overpayment of taxes. A carry-back credit is an entirely different matter because it derives its benefit from the current deductibility of the costs from taxable income. In this sense the carry-back credit is also different from other credits such as scrap and salvage credits, rebates, insurance experience adjustments, and adjustments of accruals, which "would be handled most likely as adjustments of prior years if the years were open" (Tr. 2-63-66, 69), and pension credits (Tr. 2-66-68).

29. The principal accounting witness for the Government was Melvin Weiser, a certified public accountant and a college teacher of accounting, employed by the Defense Contract Audit Agency and its Army predecessor since at least 1953. In 1971-72 he had been the head of the Audit Guidance and Procedures Branch in DCAA Headquarters, the component responsible for advising field offices on treatment of cost matters (Tr. 3-5, 3-50). Mr. Weiser generally confirmed Mr. Peterson's testimony about the stature of the Accounting Principles Board and the force of its opinions. However, he pointed out that APB No. 11 was primarily directed to published financial statements and was not intended to apply to the allocation of income tax expenses to individual contracts or similar cost objectives (Tr. 3-15). In this connection he referred to paragraph 6 of APB which reads:

> "6. This Opinion applies to financial statements which purport to present financial position and results of operations in conformity with generally accepted accounting principles. It does not apply (a) to regulated industries in those circumstances where the standards described in the Addendum (which remains in effect) to APB Opinion No. 2 are met and (b) to special areas requiring further study as specifically indicated in paragraphs 38-41 of this Opinion. The Board has deferred consideration of the special problems of allocation of income taxes in interim financial statements and among components of business enterprise pending further study and the issuance of Opinions on the applicability of generally accepted accounting principles to these statements."

30. Further, Mr. Weiser emphasized that in APB No. 11 the Board was concerned more with the question of realizability than it was with the year of benefit. He pointed out that the basic question was whether the tax effect of the loss carry-back should be considered in the loss year or not until the money is actually received. The example he gave here was that if a firm reported it was going to receive a $10 million payment as a result of a loss carry-back but that payment never materialized, neither would the reported reduction in the loss (Tr. 3-18-21).

31. Mr. Weiser differed with Mr. Peterson's opinions also in other matters. In his opinion the New York State franchise tax was not an income tax but a tax on the privilege of doing business, with one of the bases of assessment relating to income (Tr. 3-23-24). Another point was that the tax credit really was not a subsidy for the company's loss

in 1971 but a reduction of its 1968 tax liability and thus a tax refund which he defined as "cash received by a taxpayer from a taxing authority as the result of a tax loss carryback." He also pointed out that the loss carry-back method was more in the nature of income averaging and that even APB No. 11 referred in paragraph 44 to "refunds" (Tr. 3-25-31).

C. *Conclusionary Fact Findings*

32. On the basis of the expert testimony and the documents in evidence we conclude that the write-down of the value of the F-14 inventory in 1971 was in accord with the generally-accepted accounting principles which require reporting of a loss in the year when it is realized (Tr. 2-64, 110). Likewise, the reporting of the tax credits resulting from the recognition of the loss in the 1971 financial statement was in accordance with APB No. 11, paragraph 44.

CONTENTIONS OF THE PARTIES

Appellant's position that the credit or payment received on account of the reduction in its 1968 New York State franchise tax should for contract cost determination purposes be allocated on the basis of input into the 1971 G&A expense pool is based on the following arguments:

The pertinent contract clause ("Allowable Cost, Incentive Fee, and Payment") is silent in allocating credits to time periods. Therefore, cost principles of ASPR Section XV, incorporated into the contract by reference, must be looked to. The applicable ASPR provisions do not contain specific guidance in this regard either, but they refer to the generally-accepted accounting principles which prescribe the method for allocating carry-back credits to time periods. Specifically, ASPR 15-205.41(a) incorporates the generally-accepted accounting principles for purposes of accruing tax costs and in the absence of guidance in 15-201.5 and inapplicability of 15-205.41(c), the same principles should govern allocation of tax credits.

These principles as represented by APB No. 11 require allocation of the income tax benefit from a net operating loss carry-back result to the year of 1971 in which the loss was realized and recognized. For the purposes of this application the tax in question is considered to be an income tax.

The economic reality in accounting requires that the economic benefit and the cause creating it be matched. This would be obtained only by applying the tax credit or benefit to the same year in which the loss was experienced or realized. This year is 1971 because the loss was created by events occurring in 1971.

The allocation of the net operating loss carry-back result to the year of loss is consistent with the tax allocation required by the IRS and SEC and with appellant's DCAA-approved practice since 1969.

The tax credit or payment here in question was not a "tax refund" but a tax subsidy "designed to subsidize loss companies in the loss year . . . and to induce businesses to locate in New York". The argument goes further to state that "income tax loss carryback credit is not a prior period adjustment or similar to a prior period adjustment." Therefore, ASPR 15-201.41(c) is not applicable since it deals only with credits arising out of prior period adjustments. In any event, under this provision the Government has only the right to ask either for a cash refund or credit, but not the right to dictate accounting procedure for credit.

Respondent's position basically is that the tax credit received is a refund which pursuant to paragraph (f) of the "Allowable Cost, Incentive Fee, and Payment" clause should be paid to the Government because it is tied to and dependent on the 1968 franchise tax and therefore must be allocated to the 1968 expense pool. Since the contract provision adequately governs the situation, and does not incorporate

the ASPR cost principles, in respondent's opinion there is no need to have recourse to ASPR cost principles or the generally-accepted accounting principles. Its other contentions are:

By allocating the refund on the basis of the 1971 G&A cost input appellant is returning to the Government a share of the refund disproportionate to the cost reimbursed originally by the Government on account of the franchise tax in 1968, and a method of allocation which distributes costs inequitably cannot stand under ASPR 15-201.4.

APB No. 11 is specifically concerned with financial reporting of the companies and by prescribing recognition both of the operating loss and the tax refund resulting therefrom in the same year it only intended to establish the timing of the recognition of the refund as income and cannot be construed as reaching into the area of allocation of credits or costs between contracts or other procurements.

Respondent also contends that the legislative history of the Federal income tax loss carry-back provision which is incorporated into the New York franchise tax law, supports the view that tax refund resulting from the application of the loss carry-back should be allocated to contracts in the year from which the refund emanates.

Both parties cite the Board's decision in *Northrop Corp.*, ASBCA No. 8502, 1964 BCA par. 4102, as supporting their positions. In *Northrop* the issue was whether the Government was entitled to a portion of the proceeds of California state franchise tax refund received in the contractor's fiscal year 1959 as a result of the Renegotiation Board's adjustment of the contractor's gross profits in FY 1955, in the same ratio as the contractor was reimbursed under cost type contracts during FY 1956 when the franchise tax was paid. The contractor's basic argument was that the refund arose out of a statutory renegotiation which does not constitute performance of or any operation under any Government contract within the meaning of the contract clause covering refunds.

The Board held that as the franchise tax was charged for the privilege of performing and operating under the subject contracts in the State of California, the refund of this tax arose out of the performance of the contract and that therefund was allocable as between appellant's cost reimbursement type Government contracts and appellant's other sales in the same ratio as the franchise tax paid in 1956 was reimbursed by the Government as contract cost.

Respondent cites this case for the proposition that the refund should be allocated to the year in which the franchise tax was originally reimbursed, i.e. 1968. Appellant's reliance is to the effect that the Northrop case, in its opinion, applied the generally-accepted accounting principles and employed the causal economic analysis by applying the tax refund to the year (1955) in which the retroactive reduction of 1955 revenues arose. Therefore, Grumman should be permitted to allocate its tax refund to 1971 which was the year in which the net operating loss arose causing the tax refund, thus matching the tax credit in accounting period with its cause.

Decision

Instead of treating the payment received as a "tax refund", appellant's ingenious argument would transform it into an economic "subsidy" the allocation of which would not be governed by paragraph (f) of the "Allowable Cost, Incentive Fee, and Payment" clause which provides that "any refunds . . . , or other amounts (including any interest thereon) accruing to or received by the Contractor . . . shall be paid by the Contractor to the Government to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract." We are unable to agree with this position. ". . . [A]n interpretation which gives a reasonable meaning to

all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible [citations omitted]." *Hol-Gar Manufacturing Corp.* v. *United States,* 169 Ct. Cl. 384, 395 (1965).

There is no need to delve into semantics or allegedly underlying economic policies and theories in order to determine the legal nature of the tax credit or payment here in issue. For the purposes of applying the provisions of the subject contract or ASPR, we consider it to be a "refund" as this term is commonly used:

> "Sums of money received by the government or its officers which, for any cause, are to be refunded or restored to the parties paying them; such as excessive duties or taxes, . . ." BLACK'S LAW DICTIONARY 1447 (rev. 4th ed. 1968).

This definition is in accord with the meaning given to this term by the courts. See *United States* v. *Wurts,* 303 U.S. 414 (1938); *Universal Oil Products Co.* v. *Campbell,* 181 F.2d 451 (7th Cir. 1950); *State ex rel. Sidenfaden* v. *United States,* 193 F.2d 47 (7th Cir. 1951); *Rushlight Automatic Sprinkler Co.* v. *United States,* 294 F.2d 572 (9th Cir. 1961), involving refund of a former year Federal income tax as a result of a net operating business loss carry-back. It is consistent with terminology used by the New York State's taxing authority as shown in the caption of the form prescribed for claiming the payment involved: "Claim for Credit or *Refund* of Corporation Tax Paid" (emphasis supplied) and in APB No. 11 which refers to the tax effect of the realizable loss carry-backs as a "refund" of past taxes. Also, IRS Revenue Ruling 65-190, on which appellant relies, unequivocally speaks of "a *refund* of New York State corporation franchise taxes resulting from a net operating loss carryback . . ." (emphasis supplied).

Hence we conclude that the allocation of the 1968 franchise tax refund is governed by the provisions of paragraph (f) of the "Allowable Cost, Incentive Fee, and Payment" clause.

There is no dispute that the refund appellant received on its 1968 franchise tax was caused or generated by application of the net operating loss carry-back from appellant's 1971 fiscal year to its 1968 net income which had formed the basis for the computation of the franchise tax in that year. This "carry-back" feature, however, does not change the nature of the refund as a reduction of appellant's 1968 franchise tax liability and a restitution of a portion of the tax paid in 1968, for which appellant had been reimbursed by the Government in the proportion the Government's cost reimbursement type contracts had been charged with appellant's G&A expenses in that year. Thus this refund is "properly allocable" to the 1968 tax payment which represents the "costs for which the Contractor has been reimbursed by the Government," within the meaning of paragraph (f) of the "Allowable Cost, Incentive Fee, and Payment" clause.

The Government's rights in the refund of the 1968 franchise tax are tied to and dependent upon the amount of costs which it has reimbursed to appellant. Hence, reduction in appellant's 1968 franchise tax liability should be applied to proportionately reduce the Government's cost reimbursement. "ASPR cost principles are concerned with assuring that if the Government pays a cost and later that cost is reduced, by whatever means, the Government receives the benefit of that reduction. This is fair and reasonable. . . ." *RMK-BRJ, A Joint Venture,* ASBCA No. 16031, 74-1 BCA par. 10,535 at 49,896. Cf. *Northrop Aircraft, Inc.* v. *United States,* 130 Ct. Cl. 626 (1955).

Accordingly, allocation of the refund can fairly and equitably be accomplished by crediting the refund to various

contracts on the same basis as they were charged with the original 1968 tax payment. The subject contract should be credited with the refund in the ratio it was charged with appellant's 1968 general and administrative expense pool. *Northrop Corp., supra.* Allocation on any other basis would be inconsistent with the mandate of the contract clause, especially when it would result in crediting government cost reimbursement type contracts with 14.22% of the refund, as appellant suggests, instead of with 39.77% when applying the 1968 allocation formula.

We consider this result to be in full accord with the cost principles of ASPR Section XV where Section 15-201.1 defines the total costs of a contract as "the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, *less any allocable credits*" (emphasis supplied), and Section 15-205.41(c) mandates that any refund of taxes attributable to taxes "which were allowed as contract costs, shall be credited or paid to the Government in the manner directed by the Government." Inasmuch as the contractor had been proportionately reimbursed by the Government for the 1968 franchise tax, which was reduced by the refund, we perceive no merit in appellant's argument that the latter provision is applicable only to prior period adjustments which do not include tax refunds of the type involved in this case.

The appeal is denied.

Dated 12 September 1975.

/s/ V. John Riismandel
V. John Riismandel
Administrative Judge
Member of Division No. 4
Armed Services Board of
Contract Appeals

I concur

/s/ Robert J. Rowe
Robert J. Rowe
Administrative Judge
Member of Division No. 4
Armed Services Board of
Contract Appeals

I concur

/s/ Richard C. Solibakke
Richard C. Solibakke
Administrative Judge
Chairman, Armed Services
Board of Contract Appeals

I concur

/s/ Harris J. Andrews, Jr.
Harris J. Andrews, Jr.
Administrative Judge
Vice Chairman,
Armed Services
Board of Contract Appeals

OPINION AND JUDGMENT OF COURT OF CLAIMS

IN THE UNITED STATES COURT OF CLAIMS

No. 71-76

(Decided November 15, 1978)

GRUMMAN AEROSPACE CORPORATION v. THE UNITED STATES

Gene Perry Bond, attorney of record, for plaintiff. *Robert P. Murphy, Chapman, Duff & Paul, Raphael Mur* and *Robert W. Ballin,* of counsel.

Anthony Thompson, with whom was *Assistant Attorney General Barbara Allen Babcock,* for defendant. *David S. Eisenberg,* of counsel.

Before DAVIS, *Judge,* Presiding, NICHOLS and SMITH, *Judges.*

OPINION

PER CURIAM: This case comes before the court on plaintiff's request for review of the recommended decision of Trial Judge Harry E. Wood, filed October 25, 1977, pursuant to Rule 166(c), on the parties' cross-motions for summary judgment, having been submitted on the briefs and oral argument of counsel. Upon consideration thereof, since the Court agrees with the trial judge's recommended decision, as hereinafter set forth, it hereby affirms and adopts the said decision as the basis for its judgment in this case. Therefore, plaintiff's motion for summary judgment is de-

nied, defendant's cross-motion for summary judgment is granted and plaintiff's petition is dismissed.

OPINION OF TRIAL JUDGE*

WOOD, *Trial Judge:* In this action, before the court for review under the standards of the Wunderlich Act, 41 U.S.C. §§ 321-22 (1970), plaintiff, an operating subsidiary of the Grumman Corporation ("Grumman"), challenges as legally erroneous and unsupported by substantial evidence an adverse decision by the Armed Services Board of Contract Appeals.[1]

The decision under review involved a portion ($90,737) of what plaintiff calls a "state income tax credit" (and the Board called a "franchise tax refund") of some $1,500,000, plaintiff's allocable share of a slightly larger amount received by Grumman in 1972 in consequence of a claim for credit or refund of New York State corporation franchise tax paid for the year 1968. The claim for credit or refund resulted from carry-back of a substantial net operating loss, realized by Grumman in 1971, to 1968, in which year there was sufficient income to absorb the entire loss.

What was at issue before the Board, and what is at issue here, is not whether plaintiff was contractually obligated to allocate to defendant some portion of the credit or refund it received in 1972, but whether that credit or refund is to be allocated to contracts on the basis of the participation of those contracts in plaintiff's 1968 General and Administrative expense (G&A) input base or, as plaintiff contends, on the basis of the participation of those contracts in plaintiff's 1971 G&A input base.

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* The opinion and recommended conclusion of law are submitted pursuant to Rule 166(c). The necessary facts are stated in the opinion.

[1] *Grumman Aerospace Corporation,* ASBCA No. 18590, 75-2 BCA ¶ 11,492.

In rejecting plaintiff's argument for allocation to 1971, the Board held that the "tax refund" was a "reduction of [plaintiff's] 1968 franchise tax liability" and a restitution of a portion of the tax paid in 1968, for which [plaintiff] had been reimbursed by the Government in the proportion the Government's cost reimbursement contracts had been charged with [plaintiff's G&A] expenses in that year"; that the "refund is 'properly allocable' to the 1968 tax payment * * *"; and that it should be credited to those "various contracts on the same basis as they were charged with the original 1968 tax payment." *Grumman Aerospace Corp.*, ASBCA No. 18590, 75-2 BCA ¶ 11,492, at 54,831.

The essence of plaintiff's position herein appears to be that the Board erred (1) in not finding the defendant estopped from applying the 1972 credit or refund to 1968, rather than 1971, overhead, and (2) in not holding that the credit or refund was "only properly allocable to 1971". Defendant contends that to the extent questions of estoppel are properly before the court,[2] that doctrine is of no avail to plaintiff, and that the Board decision allocating the credit or refund to 1968 is supported by substantial evidence and legally correct.

The basic facts undelying this controversy, detailed hereinafter, are largely undisputed.[3] For reasons which will appear, itis concluded that plaintiff is not entitled to recover.

I

The contract here involved (N00019-67-C-0078, also called the EA-6B contract) originated as a letter contract offered to the Naval Air Systems Command by Grumman Aircraft

[2] Defendant suggests a failure "to raise timely the estoppel issue", and urges that such issues not raised administratively should not now be considered.

[3] Plaintiff does assert, however, that the Board failed to make some essential findings of fact, and that certain findings made were incomplete.

Engineering Corporation ("GAEC") July 26, 1966, and accepted by the Naval Air Systems Command August 5, 1966. That letter contract was superseded January 19, 1968, by a definitized cost plus incentive fee contract. On June 30, 1969, as a result of a corporate reorganization,[4] a novation agreement between defendant, GAEC, and plaintiff, was executed. Pursuant to that agreement, the EA-6B contract, which required GAEC to modify three government-furnished A6A aircraft to add all-weather electronic countermeasures, to manufacture five preproduction EA-6B aircraft, to flight test the said aircraft, and to provide (among other things) training, special support, and engineering and technical services, was transferred from GAEC to plaintiff. The last aircraft to be supplied under the terms of the EA-6B contract was delivered in March 1970.

In and after 1968, New York State imposed a "State Franchise Tax on Business Corporations", requiring that the amount of tax due be determined following a series of calculations: one on the basis of the taxpayer's "entire net income"; one on the basis of business and investment capital; and one on the basis of "entire net income" plus payments to certain officers and shareholders. The tax due was the largest of these amounts, except that payment of a statutory minimum (a flat fee of $125) was in any event required. An additional tax computed on the basis of the portion of the taxpayer's "subsidiary capital allocated within the state * * *" was also called for.

In and after 1968, a New York State statute provided that a "net operating loss deduction shall be allowed which shall be presumably the same as the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code of nineteen hundred fifty four * * *." Under this provision, net operating losses could be carried

[4] In the process, GAEC became Grumman Corporation.

back for 3 years or carried forward for 5 years. *Cf. United States* v. *Foster Lumber Co.,* 429 U.S. 32 (1976).

In and after 1968, the New York State franchise tax on business corporations was an element of G&A expense to Grumman. Grumman's G&A expense pool was allocated to individual contracts on the basis of their total cost input (direct labor, direct material, and manufacturing and engineering overhead costs). Grumman paid a New York State corporation franchise tax of $1,807,870 for 1968, according to the Board.[5] That defendant reimbursed plaintiff for the amount of that payment properly allocable to the EA-6B contract here in suit is clear.

It is also important to note, since in the last analysis it underlies and is responsible for this litigation, that during 1968, a substantially greater proportion of Grumman's government contract business was in cost-type contracts than was the case in 1971. The actual percentages for each year are as follows:

Type of Contract	Percentage Participation in *Allocation Base*	
	1971	*1968*
Cost type	14.22%	39.77%
FPI	63.06	20.14
FFP & Other	22.72	40.09

II

In 1969, plaintiff (or GAEC, as its corporate predecessor) entered into a contract with defendant described by the Board as follows:

> The contract * * * was a total package procurement calling for the design, development, test, and evaluation of an aircraft which became known as the F-14 Tomcat. The contract also called for the production of a specified number of aircraft and contained options for the Government to purchase additional quantities. This contract was of the fixed price incentive fee variety so that up to a point costs were paid by the Government. Between that point and a ceiling the costs were shared between the Government and the contractor, but over the ceiling all costs were borne by Grumman.

[5] The 1968 New York State franchise tax return, filed in the name of GAEC, reflects a tax due of $1,889,163.71. The figure stated in the text appears in Grumman's 1972 claim for credit or refund of corporation tax paid, referred to hereinafter.

In its Annual Report for 1971, Grumman reported a net loss, after "Provision (credit) [of $18,200,000] for Federal taxes on income", of $17,989,580, and a substantial estimated pretax loss on the contract, entered into in 1969, for the F-14 aircraft. In the words of the Annual Report, the said loss was reflected on Grumman's books by a writedown of "its F-14A inventories to realizable values by a charge to earnings in 1971 of $65,000,000, before tax adjustments, representing the estimated loss which will be incurred in the performance of the work now required by its contract for the F-14A Tomcat aircraft."

The Board found that the said writedown of the F-14 inventories to realizable values in 1971 was in accordance with generally accepted accounting principles (requiring that a loss be reported in the year in which it is realized), that the F-14 contract "gave rise to the loss in question here * * *", and that "Likewise, the reporting of the tax credits resulting from the recognition of the loss in the 1971 financial statement was in accordance with APB No. 11, paragraph 44", Accounting for Income Taxes, December 1967.[6] Those findings deserve finality.

[6] APB Opinion No. 11 was promulgated by the Accounting Principles Board, American Institute of Certified Public Accountants. The Board opinion suggests, and the evidence abundantly establishes, that such opinions, where applicable, amount to important requirements in the accounting profession, and that account-

In early 1972, Grumman filed with the New York State Corporation Tax Bureau, Form CT-8, "Claim for Credit or Refund of Corporation Tax Paid * * * for period ended December 31, 1968." The said Form CT-8 reflected that Grumman (formerly GAEC) had paid a tax of $1,807,870 for 1968, and requested a "credit or refund" (hereinafter "credit") of $1,590,888 (computed by deducting from the amount of tax paid for 1968 the sum of $216,982, the minimum tax payable for 1968).[7] In mid-1972, in consequence of the filing of the Form CT-8, Grumman received from the State of New York a credit or payment of $1,609,000 (including interest). The Board found that the credit "was caused or generated by application of the net operating loss carry-back from appellant's 1971 fiscal year to its 1968 net income which had formed the basis for the computation of the franchise tax in that year." Neither party questions that finding here.

After Grumman received the New York State tax credit or payment, it recognized that since the New York State franchise tax had been and was an element of G&A expense, the credit had to be applied to contracts, and in a particular time frame. Considerable internal study of the problem followed,[8] and, by memorandum dated August 4, 1972, Grumman advised the resident auditor, Defense Contract Audit Agency ("DCAA"), that it proposed (1) to allocate

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ants depart from such opinions only at very substantial personal risk. See *Merritt-Chapman & Scott Corp.* v. *United States,* 208 Ct. Cl. 639, 651, 528 F.2d 1392, 1398 (1976).

[7] A small subsidiary capital tax was added in arriving at the "Total Tax" due. The 1968 minimum tax due was, in essence, computed on the basis of "Allocated Business Capital".

[8] While the Board did not specifically so find, the facts stated in the text are derived from clear and undisputed evidence in the record. Accordingly, their inclusion herein is appropriate. *Merritt-Chapman & Scott Corp.* v. *United States, supra.*

the credit to its various subsidiaries (including plaintiff) on the basis of the proportion of the net income or loss of each of them to the entire loss, in accordance with Grumman's prior practice, and (2) to determine and apply the credit "to individual contracts * * * using the 1971 G&A base."

In accordance with the first element of the foregoing advice, Grumman allocated $1,538,585 of the credit it had received in 1972 to plaintiff. The Board did not, and defendant does not now, question the propriety of *that* allocation. Grumman's proposal to apply the credit to individual contracts using a 1971 G&A base was, however, rejected by DCAA. That agency asserted that the credit should be allocated to contracts on the basis of 1968 mix when, as noted, Grumman had a greater proportion of cost-type government contracts than it did in 1971. When plaintiff refused to accede to DCAA's position, DCAA's resident auditor issued a DCAA Form 1, "Notice of Contract Costs Suspended and/or Disapproved". Insofar as DCAA Form 1 pertained to the EA-6B contract here involved, the amount of costs disapproved was $90,737.[9] Plaintiff timely appealed that decision to the Board,[10] was unsuccessful there, and now seeks reversal of that administrative denial of its claim.

III

At the outset, plaintiff contends that the Board erred in failing to hold that defendant was estopped from allocating the credit to 1968, asserting that there was mutual agree-

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[9] The said disapproval explicitly affected another listed "major cost type" contract, and implicitly affected other contracts as well.

[10] While the administrative judge who handled prehearing proceedings and presided at the Board hearing did not write the administrative decision, plaintiff has failed to show that that fact is of any present significance. *Tri-Cor, Inc.* v. *United States,* 198 Ct. Cl. 187, 194-95, 458 F.2d 112, 116-17 (1972), and cases there cited.

ment, during 1971 contract negotiations, "that any state income tax credits received for 1971 would be considered as credits to [plaintiff's] 1971 overhead costs", and that, commencing in 1969, DCAA had approved what plaintiff terms its method of contract cost allocation or its practice of state tax allocation for defense contracts under the profit or loss allocation system. The Board made no findings on, and did not discuss the matter of, estoppel.

All else aside, plaintiff's view of the facts respecting the alleged 1971 mutual agreement is an insupportable one. The administrative record is clear that not even plaintiff gave any thought to the question of the application of the credit to a time frame until after receipt of the credit in mid-1972. Proof that there was a shared "assumption" that the credit would be applicable to 1971 overhead, that defendant changed "its F-14 negotiation and settlement position on state income tax allocation retroactively", or of reliance by plaintiff on governmental representations respecting state franchise tax allocation to 1971, as plaintiff asserts, is wholly lacking. No basis for holding defendant estopped from allocating the credit to 1968 on this ground has been shown. *Rel-Reeves, Inc.* v. *United States,* 209 Ct. Cl. 595, 636, 534 F.2d 274, 296-97 (1976); *H & M Moving, Inc.* v. *United States,* 204 Ct. Cl. 696, 710, 499 F.2d 660, 667-68 (1974).

In connection with the second prong of plaintiff's estoppel argument, it is worthy of note that plaintiff's statement of questions presented to the Board mentioned estoppel not at all, and that the only explicit reference to that doctrine in plaintiff's presentations to the Board appears in the "Conclusion" section of its post-hearing brief, as follows: "* * * the Government is estopped from negotiating costs on one basis and determining allowable cost at the same time on another." That oblique statement was obviously directed to the premise, held herein to be erroneous, of a 1971 mutual agreement subsequently and retroactively changed by defendant. *Cf. William F. Klingensmith, Inc.* v. *United States,* 205 Ct. Cl. 651, 665, 505 F.2d 1257, 1265-66 (1974); see also *Conrac Corp.* v. *United States,* 214 Ct. Cl. 561, 558 F.2d 944 (1977); *Simplex Mfg. Corp.* v. *United States,* 205 Ct. Cl. 858, 860 (1974); *Remler Co.* v. *United States,* 179 Ct. Cl. 459, *cert. denied,* 389 U.S. 840 (1967).

Assuming for present purposes that plaintiff's claim that DCAA's approval of plaintiff's method of contract cost allocation estops defendant from allocating the credit to 1968 is properly before the court, however, plaintiff's arguments and record citations fail to establish that the result plaintiff seeks is justified. While plaintiff asserts that "the system automatically and consistently gave any carryback credit to the loss year", that assertion is an unsupported one. Indeed, the record affirmatively reveals no prior "loss year" during the period 1968-70. *Litton Systems, Inc.* v. *United States, 196 Ct. Cl. 133, 449 F.2d 392 (1971), cited by plaintiff in this connection, is entirely inapposite. Again, no valid basis for holding defendant estopped from allocating the credit to 1968 has been shown. Rel-Reeves, Inc.* v. *United States, supra; H & M Moving, Inc.* v. *United States, supra.*

Another matter related to the question of estoppel (in defendant's view, but not in plaintiff's) arises from plaintiff's contention that at the administrative hearings held in this case in June 1974, defendant's expert accounting witness from DCAA "did not express the views of DCAA * * *", and that plaintiff was thereby misled. In support of this contention, plaintiff's main brief asserts, without any support in the administrative record, that, in July 1974, DCAA took "another position on income tax allocation accounting" than had defendant's expert accounting witness before the Board a month earlier. DCAA's assertedly inconsistent July 1974 "public view", as plaintiff's main brief describes it, was "publicly stated" in response to a Financial Accounting Standards Board (FASB) inquiry. In a supplemental brief, plaintiff has attached an excerpt

from a letter of July 19, 1974, from DCAA to the FASB, and urges, in substance, that DCAA's July 1974 position and its treatment of plaintiff at issue in this case are completely inconsistent.

In its response to plaintiff's supplemental brief, defendant argues that while DCAA's July 1974 position is consistent both with defendant's and DCAA's position in this case, "This estoppel issue" was not raised before the Board, and "is thus improperly before the court." Among other authorities, *Conrac Corp.* v. *United States, supra,* is cited in support of the proposition. In reply, plaintiff says that the July 1974 letter from DCAA is relied upon as a "strongly probative fact supporting" the position taken by plaintiff both before the Board and here, and not by way of estoppel.

Although this case was heard administratively June 17-19, 1974, it was not decided by the Board until September 23, 1975. DCAA's assertedly differing "public view" was taken in a letter dated July 19, 1974, and, according to the excerpt attached to plaintiff's supplemental brief, became a part of the FASB's "Public Record" November 1, 1974. How or when plaintiff first became cognizant of that "Public Record" does not appear. What is plain, however, is that plaintiff had abundant opportunity to bring any factual inconsistencies it now asserts to the attention of the Board prior to the September 23, 1975 administrative decision herein, or even after that decision by way of a motion for reconsideration, but failed to do so.

In the foregoing circumstances, defendant's estoppel authorities are not controlling here. In this Wunderlich Act review, however, defendant's contention that plaintiff's arguments based on an alleged DCAA change of position on income tax accounting allocation are not properly before the court is nonetheless sound. *McKee* v. *United States,* 205 Ct. Cl. 303, 329, 500 F.2d 525, 539 (1974); *Northbridge Electronics, Inc.* v. *United States,* 195 Ct. Cl. 453, 463, 444 F.2d 1124, 1130 (1971); *cf. United States* v. *Carlo Bianchi & Co.,* 373 U.S. 709 (1963).

IV

The EA-6B contract here in suit contained, among other clauses, Article 4, "Allowable Cost, Incentive Fee, and Payment (Apr. 1966) (ASPR 7-203.4(b) Rev. 17)", providing in part as follows:

> (a)(1) For the performance of this contract, the Government shall pay to the Contractor—
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> (i) the cost thereof (hereinafter referred to as "allowable cost") determined by the Contracting Officer to be allowable in accordance with—
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> (A) Part 2 of Section XV of the Armed Services Procurement Regulation as in effect on the date of this contract; and
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> (B) the terms of this contract; * * *
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> *   *   *   *   *
>
> (f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract.

For purposes of the EA-6B contract, Armed Services Procurement Regulation (ASPR) Section 15-201.1, "Composition of Total Cost", a part of Section XV, defined the total cost of a contract as "the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits." Section 15-201.4, "Definition of Allocability", dealt with determining the circumstances in which "a cost is allocable to a Government contract * * *", and Section 15-201.5, "Credits", pro-

vided that "The applicable portion of any income, rebate, allowance, and other credit relating to any allowable cost, received by or accruing to the contractor shall be credited to the Government * * *." Sections 15-201.2 and 15-203 dealt, respectively, with "Factors Affecting Allowability of Costs" and "Indirect Costs".

Section 15-205 treated "Selected Costs". Section 15-205.41, "Taxes", contained three subsections. In pertinent part, Section 15-205.41(a) provided that, in general, taxes (including state and local income taxes) which a contractor was required to pay and which were paid or accrued in accordance with generally accepted accounting principles were, with specified exceptions, allowable, and Section 15-205.41(c) provided in part as follows:

> (c) Any refund of taxes, interest, or penalties, and any payment to the contractor of interest thereon, attributable to taxes, interest, or penalties which were allowed as contract costs, shall be credited or paid to the Government in the manner directed by the Government * * *.

While it is difficult to set forth in any concise form plaintiff's many assertions in support of the broad proposition that the Board erred in holding the credit to be "properly allocable" to 1968, within the meaning of Article 4(f), *supra,* the theme underlying those assertions is that, under "sound accounting logic" and generally accepted accounting principles (GAAP), the credit was "only properly allocable to 1971."

Among other things, plaintiff asserts that there is an "accounting requirement to account for a net operating loss income tax credit as a credit to the year of the loss"; that there is an "incorporation of income tax allocation accounting within the ASPR Section XV cost principles"; that under GAAP and sound accounting the credit must be associated or "matched" with the "occurrence which gave rise

to the * * * credit"; that viewing the credit as either a reduction of Grumman's 1968 franchise tax or as allocable to 1968 costs is "contrary to sound accounting logic and contrary to GAAP"; that under "the best accounting logic available and under GAAP" the credit was a reduction of 1971 costs, rather than a reduction or refund of 1968 franchise taxes; that "the best and most logical system of accounting for income taxes and income tax credits is to assign the income tax credit from losses to the loss year"; that both Internal Revenue Service rules and Securities and Exchange Commission practices support allocation of the credit to 1971; and that a "profit and loss system of state income tax allocation assigns tax credit to loss years without retroactive carryback to prior years * * *."

From the foregoing, it is readily apparent that all of plaintiff's many attacks on the Board's determination of allocability of the credit to 1968 are founded upon income tax and accounting concepts, with considerable and repeated reference to, and stress upon, "sound accounting logic" and GAAP.[11]

As defendant sees the matter, Article 4(f), *supra,* and the ASPR cost principles incorporated therein, are controlling, and require allocation of the credit to 1968. In defendant's view, the income tax and accounting concepts upon which plaintiff relies "to override the mandate of its contract with defendant" are irrelevant. Defendant concludes that the Board fairly and reasonably considered the

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[11] Plaintiff complains that the Board noted that allocation of the credit to 1971 would result in crediting government cost reimbursement type contracts with less money than would allocation to 1968. That a particular result leads to greater governmental recovery than does another is a wholly improper basis for deciding whether or not plaintiff's position has any merit. The administrative decision here rested on other grounds, however, and, if correct under Wunderlich Act standards, is not to be reversed simply because an improper consideration was noted therein.

evidence and the legal arguments presented by plaintiff in its "attempts to apply tax and accounting concepts to what is, in reality, no more than an elementary contract case", and that in this Wunderlich review the Board decision should be upheld.

Neither party cites, nor has independent research revealed, any case (save that under review) in which the precise issue here present has been considered by the Board, nor has this court heretofore considered that question. Nonetheless, some decisional guidelines to a just result are available. After careful consideration of the record, the arguments advanced by both parties, and those guidelines, it is concluded that the result reached administratively is factually and legally correct.

Article 4(f), *supra*, and the ASPR cost principles it incorporates, have a common goal: both "are concerned with assuring that if the Government pays a cost and later that cost is reduced, by whatever means, the Government receives the benefit of that reduction. This is fair and reasonable * * *." *RMK-BRJ*, ASBCA No. 16031, 74-1 BCA ¶ 10,535 at 49,896. In *Northrup Aircraft, Inc.* v. *United States*, 130 Ct. Cl. 626, 630, 127 F. Supp. 597, 599 (1955), this court reached essentially that same conclusion, holding that "a [cost plus a fixed fee] contract makes the Government liable only for such costs as the contractor incurs and any reduction of a cost after reimbursement entitles the Government to a refund." See also *Northrup Corp.*, ASBCA No. 8502, 1964 BCA ¶ 4102.[12]

[12] In *Northrup Corp.*, the contractor incurred a California State franchise tax for its fiscal year 1956 based on its net income in fiscal 1955, and included the amount paid as a reimbursable cost in its administrative overhead pool. In 1958, a determination that the contractor had had excessive profits in 1955 was made by the Renegotiation Board. The contractor then applied for, and in 1959 received, a refund from the California State Franchise Board as a result of the reduction or adjustment in the contractor's taxable income for 1955. The question was whether the refund should be treated as income of the contractor or a reduction of 1956 costs under the terms of its government cost reimbursement contracts. The Board held that the refund was a reduction of 1956 costs, and that defendant was entitled to share in the refund to the extent it had reimbursed the contractor for such costs.

In an effort to avoid the force of those holdings, plaintiff contends that the Board erred in finding the credit to be a "reduction of appellant's 1968 franchise tax liability and a restitution of a portion of the * * *" New York State franchise taxes paid in 1968. That contention cannot be accepted. Plaintiff applied for and received a "Credit or Refund of Corporation Tax Paid * * * for the period ended December 31, 1968." Although that credit was obviously attributable to carryback of a net operating loss from 1971 to 1968, the credit was, both literally and plainly, a "refund" of, and a reduction in the amount of, Grumman's New York State franchise tax liability for 1968. See *Allegheny Airlines, Inc.* v. *Civil Aeronautics Board*, 465 F.2d 778, 783 (4th Cir. 1972);[13] *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 759 (1961).

Indeed, Rev. Rul. 65-190, 1965-2 Cum. Bull. 150, upon which plaintiff relies, specifically refers to "a refund of New York State corporation franchise taxes resulting from a net operating loss carryback", and APB Opinion No. 11, also cited by plaintiff, alludes to the tax effects of any realizable loss carrybacks as giving rise to "a refund (or claim for refund) of past taxes * * *." In the circumstances, the Board's conclusion that there was a refund of (and a reduction in the amount of) Grumman's 1968 franchise tax

[13] See also *Hughes Air Corp.* v. *Civil Aeronautics Board*, 482 F.2d 143 (9th Cir. 1973); *Texas International Airlines, Inc.* v. *Civil Aeronautics Board*, 458 F.2d 782 (D.C. Cir. 1971); *Ozark Airlines, Inc.* v. *Civil Aeronautics Board*, 441 F.2d 892 (8th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).

costs, within the meaning of Article 4(f), *supra*, cannot be faulted.[14]

Plaintiff repeatedly stresses "sound accounting logic" and GAAP, both as demonstrating that the Board's conclusion is erroneous, and as making the credit "properly allocable" to 1971, rather than to 1968. Plaintiff's many arguments based upon such logic and principles need not be specifically discussed; while they have been carefully considered, they do not support any different result. *Northrop Aircraft, Inc.* v. *United States, supra; RMK-BRJ, supra; Northrop Corp., supra; Allegheny Airlines, Inc.* v. *Civil Aeronautics Board, supra; Bulova Watch Co.* v. *United States, supra;* see also *Lockheed Aircraft Corp.* v. *United States,* 179 Ct. Cl. 545, 555 n. 5, 375 F.2d 786, 792 n. 5 (1967); *United States Steel Corp.* v. *United States,* 177 Ct. Cl. 26, 43 n. 18, 367 F.2d 399, 409 n. 18 (1966).[15] Plaintiff's 1968 franchise tax costs having been reduced by a subsequent refund, defendant is contractually entitled to its proper share of that reduction computed on the basis of its 1968 reimbursement of such costs. *Ibid.*

Plaintiff's vigorous efforts fail to establish that the Board erred in holding that the credit was in fact a refund of, and a reduction in amount of, plaintiff's 1968 New York State franchise taxes, and that, under the terms of Article 4(f) and the ASPR cost principles it incorporates,[16] the refund

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[14] *Univac Division, Sperry Rand Corp.*, ASBCA No. 13588, 70-2 BCA ¶ 8555, extensively cited by plaintiff, is, as defendant asserts, inapposite here.

[15] In *Lockheed*, the court noted (as it had in *United States Steel Corp.*) that "* * * one must be cautious in using 'generally accepted accounting principles' as an aid in determining the allocability of costs to government contracts. Such principles have been developed for asset valuation and income measurement, and 'are not cost accounting principles' as such, although 'cost accounting concepts * * * [may] evolve out of' them. * * *"

[16] See ASPR Sections 15-201.1, 15-201.5, and 15-205.41(c), in pertinent part quoted hereinabove.

was "properly allocable" to costs for which plaintiff had been reimbursed by defendant under the EA-6B contract. Without regard to how GAAP and sound accounting logic might treat the refund for income tax accounting purposes, the contract language controls here. See *General Dynamics Corp.*, ASBCA No. 12814, 68-2 BCA ¶ 7297, *aff'd. General Dynamics Corp.* v. *United States*, 202 Ct. Cl. 347 (1973).

In light of the foregoing, plaintiff's petition should be dismissed.

PERTINENT TEXT OF ARMED SERVICES PROCUREMENT REGULATIONS

§ 7.203-4 ALLOWABLE COST, FEE, AND PAYMENT.

ALLOWABLE COST, INCENTIVE FEE, AND PAYMENT

(MAY 1964)

(a)(1) For the performance of this contract, the Government shall pay to the Contractor—

(i) The cost thereof (hereinafter referred to as "allowable cost") determined by the Contracting Officer to be allowable in accordance with—

(A) Part 2 of Section XV of the Armed Services Procurement Regulation as in effect on the date of this contract; and

(B) The terms of this contract; and

* * *

(f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract.

§ 15.201-1 COMPOSITION OF TOTAL COST.

The total cost of a contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits. In ascertaining what constitutes costs, any generally accepted method of determining or estimating costs that is equitable under the circumstances may be used, including standard costs properly adjusted for applicable variances.

15.201-2 FACTORS AFFECTING ALLOWABILITY OF COSTS.

Factors to be considered in determining the allowability of individual items of cost include (a) reasonableness, (b) allocability, (c) application of those generally accepted accounting principles and practices appropriate to the particular circumstances, and (d) any limitations or exclusions set forth in this subpart, or otherwise included in the contract as to types or amounts of cost items.

§ 15.201-4 DEFINITION OF ALLOCABILITY.

A cost is allocable if it is assignable or chargeable to a particular cost objective, such as a contract, product, product line, process, or class of customer or activity, in accordance with the relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—

(a) Is incurred specifically for the contract;

(b) Benefits both the contract and other work, or both Government work and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

§ 15.201-5 CREDITS.

The applicable portion of any income, rebate, allowance, and other credit relating to any allowable cost, received by or accruing to the contractor, shall be credited to the Government either as a cost reduction or by cash refund, as appropriate.

§ 15.203 INDIRECT COSTS.

* * *

(d) The method of allocation of indirect costs must be based on the particular circumstances involved. The method

shall be in accord with those generaly accepted accounting principles which are applicable in the circumstances. The contractor's established practices, if in accord with such accounting principles, shall generally be acceptable.

* * *

§ 15.205-41 Taxes

(a) Taxes are charges levied by Federal, State, or local governments. They do not include fines and penalties except as otherwise provided herein. In general, taxes (including State and local income taxes) which the contractor is required to pay and which are paid or accrued in accordance with generally accepted accounting principles, are allowable, except for:

(1) Federal income and excess profits taxes;

(2) Taxes in connection with financing, refinancing or refunding operations (see § 15.205-17);

(3) Taxes from which exemptions are available to the contractor directly or available to the contractor based on an exemption afforded the Government except when the contracting officer determines that the administrative burden incident to obtaining the exemption outweighs the corresponding benefits accruing to the Government; and

(4) Special assessments on land which represent capital improvements.

(5) Taxes on any category of property which is used solely in connection with work other than on Government contract. (Taxes on property used solely in connection with either non-Government or Government work should be considered directly applicable to the respective category of work unless the amounts involved are insignificant or comparable results would otherwise be obtained; e.g., taxes on contractor-owned work-in-process which is used solely in connection with non-Government work should be allocated to such work and taxes on contractor-owned work-in-process

inventory, and Government-owned work-in-process inventory when taxed, used solely in connection with Government work should be charged to such work.)

* * *

(c) Any refund of taxes, interest, or penalties, and any payment to the contractor of interest thereon, attributable to taxes, interest, or penalties which were allowed as contract costs, shall be credited or paid to the Government in the manner directed by the Government, provided any interest actually paid or credited to a contractor incident to a refund of tax, interest or penalty shall be paid or credited to the Government only to the extent that such interest accrued over the period during which the contractor had been reimbursed by the Government for the taxes, interest or penalties.

No. 78-1420

In the Supreme Court of the United States

OCTOBER TERM, 1978

GRUMMAN AEROSPACE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 26a-43a) is reported at 587 F. 2d 498. The opinion and decision of the Armed Services Board of Contract Appeals (Pet. App. 1a-25a) is reported at 75-2 Gov't Cont. Rep. (CCH) BCA para. 11,492.

JURISDICTION

The judgment of the Court of Claims was entered on November 15, 1978. On January 31, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 15, 1979. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, in determining the amount due from a government contractor to the United States because state franchise taxes for which the United States had reimbursed the contractor were refunded, the refund should be allocated to the year in which the state franchise tax was initially paid.

STATEMENT

Petitioner is an operating subsidiary of the Grumman Corporation ("Grumman"). In 1966 petitioner's predecessor entered into a contract, known as the EA-6B contract, with the Naval Air Systems Command, calling for the production and modification of certain aircraft (Pet. App. 28a-29a). The original contract was susperseded in 1969 by a "definitized" cost-plus incentive fee contract between Grumman and the United States.[1]

Article 4 of the contract obligated the government to pay the contractor "the cost thereof * * * determined by the Contracting Officer to be allowable in accordance with—(A) Part 2 of Section XV of the Armed Services Procurement Regulation [ASPR] as in effect on the date of this contract; and (B) the terms of this contract * * *" (Pet. App. 37a). ASPR 15. 205-41 provided that taxes were an allowable cost of the contract (Pet. App. 46a). In 1968 Grumman paid a New York State corporation franchise tax of $1,807,870. In accordance with the contract's provisions, the government reimbursed petitioner for the portion of the state franchise tax that was attributable to the EA-

[1]Petitioner assumed the rights and obligations of this contract on June 30, 1969 (Pet. App. 29a).

6B contract (*id.* at 30a). Final delivery on the EA-6B contract was made in March 1970 (*id.* at 29a).

In 1971 Grumman reported a loss that gave rise to a rebate of most of the New York State franchise tax that the company had paid in 1968. The loss was incurred in connection with a contract to provide the government with an aircraft known as the F-14 Tomcat (Pet. App. 30a-31a). New York State law permits a carry-back of net operating losses for a three-year period, and a carry-forward of such losses for a five-year period (*id.* at 29a-30a). On the basis of the carry-back provisions, Grumman filed a "Claim for Credit or Refund of Corporation Tax Paid * * * for period ended December 31, 1968." Grumman received a "credit or refund" of $1,609,000 (*id.* at 32a). and it allocated $1,538,585 to petitioner (*id.* at 33a).[2]

Under the terms of the EA-6B contract, refunds to the contractor of cost items that were originally paid for by the government must be returned to the government. Article 4(f) of the contract provides (Pet. App. 37a):

> The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract.

[2]The tax rebate was allocated to Grumman's various subsidiaries (including petitioner) on the basis of their percentage contribution to the company's total net loss (Pet. App. 32a-33a).

ASPR 15.205-41(c), which is incorporated by reference into the contract, further provides in relevant part (Pet. App. 47a):

> Any refund of taxes, interest, or penalties, and any payment to the contractor of interest thereon, attributable to taxes, interest, or penalties which were allowed as contract costs, shall be credited or paid to the Government in the manner directed by the Government * * *.

In accordance with these agreements, the Defense Contract Audit Agency asserted an entitlement to 39.77% of the 1968 tax refund that was allocated by Grumman to petitioner. That represents the proportion of Grumman's business with the government in 1968 that consisted of cost-type contracts, for which franchise taxes were reimbursed by the government as general and administrative expenses (Pet. App. 8a-9a, 30a, 33a). Petitioner claimed that it was obligated to repay only 14.22% of the tax refund; that percentage corresponded to the percentage of its business accounted for by cost-plus contracts in 1971, the year of the losses that occasioned the tax refund (Pet. App. 9a).

When the disputed amount was not forthcoming, the agency disapproved payment of the contested funds from petitioner's current cost-plus contracts.[3] Petitioner appealed the decision to the Armed Services Board of Contract Appeals, which affirmed (Pet. App. 1a-25a). On petition for review under the standards of the Wunderlich Act, 41 U.S.C. 321-322, in the Court of Claims, that court granted the government's motion for summary judgment and dismissed petitioner's claims (Pet. App. 26a-43a).

[3]The disputed funds associated with the EA-6B contract amount to $90,737 (Pet. App. 33a).

Both the Board and the Court of Claims rejected petitioner's argument that the payment was not a "refund" of the 1968 tax, which would be governed by Article 4(f) of the contract, but rather an economic subsidy. They concluded that the state itself referred to the repayment as a refund, as did other authorities (*e.g.*, Rev. Rul. 65-190, 1965-2 Cum. Bull. 150) on which petitioner relied (Pet. App. 21a-23a, 41a-42a). The Board then concluded, and the Court of Claims agreed, that the terms of the contract, and the ASPR provisions that it incorporated, require allocation of the refund to the 1968 tax payments for which petitioner had been reimbursed by the United States. They noted that Article 4(f) of the contract, and the ASPR cost principles that it incorporates, " 'are concerned with assuring that if the Government pays a cost and later that cost is reduced, by whatever means, the Government receives the benefit of that reduction' " (Pet. App. 23a-24a, 40a). Only allocating the refund to 1968 will achieve this result (*ibid.*).

Because the contract's language governs, the Court of Claims considered it unnecessary to determine whether, as petitioner argued, the refund would be allocated to 1971 for federal income tax accounting purposes (Pet. App. 43a).

ARGUMENT

Petitioner renews in this Court its arguments that generally accepted accounting principles require allocation of the tax refund to 1971, the year of the losses that occasioned the refund (Pet. 13-15), and that state tax policy is frustrated by any other result (Pet. 15-17).

It also argues (Pet. 9-12) that allocation to 1968 is precluded by provisions of ASPR itself, which explicitly incorporate generally accepted accounting principles as the method of allocating costs under the contract.[4]

Petitioner is correct in noting (Pet. 11) that a number of ASPR provisions (*e.g.*, Section 15.201-15. 201-2, 15.201-4 and 15.203 (texts at Pet. App. 45a-46a)) refer to generally accepted accounting principles as a means of determining proper allocation of costs. But these provisions deal generally with initial determination of costs, not with allocation of refunds. Refunds are addressed elsewhere (see Article 4(f) of the contract, *supra;* ASPR 15.205-41(c), *supra*), and these more specific provisions necessarily govern. The Court of Claims' interpretation of those provisions involves no issue of general importance, and thus there is no reason for review by this Court.

Whatever the usual financial accounting or tax accounting treatment of state tax refunds may be,[5] the contract makes it clear that, if the government reimburses the contractor for the contractor's tax payments and the tax is later reduced "by whatever means," the government will receive the full benefit of that reduction. *RMK-BRJ,* ASBCA No. 16031, 74-1 Gov't Cont. Rep. (CCH) BCA para. 10,535 at 49,896.

[4]Petitioner also argued below that the government was estopped from allocating the income tax credit to 1968. This argument was rejected by the Court of Claims (Pet. App. 33a-37a) and is not renewed here.

[5]Cf. *Thor Power Tool Co.* v. *Commissioner*, No. 77-920 (Jan. 16, 1979) (generally recognized accounting principles do not control the availability of loss writedowns for income tax purposes).

See also *Northrop Aircraft, Inc.* v. *United States*, 127 F. Supp. 597, 599 (Ct. Cl. 1955); *Northrop Corp.*, ASBCA No. 8502, 1964 Gov'ts Cont. Rep. (CCH) BCA para. 4102.[6] Petitioner's contention, by contrast, necessarily leads to the conclusion that if, in the year that the losses were incurred, the contractor no longer had any cost-plus contracts, the government would receive no reimbursement even if all of the tax payments were refunded. This is not what the parties contemplated when they agreed that "[*a*]*ny* refund of taxes * * * shall be credited or paid to the Government in the manner directed by the Government." ASPR 15.205-41(c) (emphasis added).[7]

Petitioner's contention that the decision below fails to give effect to state tax policy also ignores the terms of the contract. Whatever state tax policy might be, petitioner agreed to return to the United States any tax refunds it received. It thereby surrendered, as a condition of the contract, any state-conferred benefit.

[6]In *Northrop Corp.* a Renegotiation Board decision in 1958 had the effect of reducing Northrop Corporation's income for 1955. As a result, Northrop received a refund of the state franchise tax it paid in 1956. The Board of Contract Appeals held that the refund constituted a reduction of 1956 costs, and that the government, under its cost-plus contract, was entitled to share in the refund to the extent that it had reimbursed the contractor for such costs. "We interpret the contract clauses * * * as obligating appellant to refund to the Government contracting agency under the cost reimbursement type contracts the same percentage of the California State franchise tax refund as was paid by the Government as reimbursement of administrative overhead pool for appellant's fiscal year ended 31 July 1956." *Id.* at 20,030.

[7]Since the contract made it clear that the 1968 refund would have to be used to reimburse the government for payments made on 1968 taxes, petitioner's claim (Pet. 12) that its expectations were frustrated is without basis.

At all events, the contention that the state tax refund was intended as a subsidy to petitioner is insubstantial. The payment is designated by the state as a refund, not a subsidy, and loss carry-back provisions are not a form of financial assistance to business. Rather, such provisions are designed to ensure that companies whose incomes are the same over an extended period will be subject to equal tax burdens. *Libson Shops, Inc.* v. *Koehler*, 353 U.S. 382, 386 (1957). The Court of Claims' decision here does not interfere with the State's attempt to equalize the amount of New York franchise tax paid by petitioner and other corporations doing business in that state. It simply requires that, once the state tax burden has been adjusted, the company reimburse the government so that the government will not have paid the contractor for costs that the contractor ultimately does not incur.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1979